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Virginia E. Nolan

Edmund Ursin

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An Enterprise (No-Fault) Liability Suitable for Judicial Adoption—with a “Draft Judicial Opinion”

VIRGINIA E. NOLAN*
EDMUND URSIN**

I. INTRODUCTION

In this Article we propose that courts recognize an enterprise liability applicable to persons injured on the premises of supermarkets. In contrast to strict products liability, victim compensation under our proposal would not turn on whether the supermarket's premises could be characterized as dangerously defective. Instead, the proposed doctrine would impose a strict enterprise liability for personal injuries arising out of the use of the supermarket's premises by entrants on those premises. The resulting doctrine would avoid the intractable—and litigation producing—defect problem, while holding down costs—and litigation—by limiting recoverable damages. Thus the doctrine would achieve, within the common law

* Class of 1975 Professor, University of San Diego School of Law. B.S. 1969, Russell Sage College; J.D. 1972, Albany Law School; LL.M. 1975, George Washington University.

** Professor of Law, University of San Diego School of Law. A.B. 1964, J.D. 1967, Stanford University.

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framework, the benefits of third-party no-fault compensation plans, described by the 1991 American Law Institute *Reporters' Study on Enterprise Responsibility for Personal Injury* as a “better blend” of “efficient compensation, economical administration, and effective [accident] prevention.”¹

Our proposed supermarket enterprise liability is supported by case law that has shaped contemporary tort law. This case law includes the decisions adopting and refining the law and policies of strict products liability, decisions abolishing the contributory negligence rule and adopting comparative negligence (thereby cutting back on damages), expansive negligence decisions, and decisions questioning the award of damages for intangible, nonpecuniary loss. This case law—and its support for our proposed doctrine—is presented in the “draft judicial opinion” in Part III of this Article.

We recognize that the policies supporting our proposed supermarket enterprise liability could support broader enterprise (no-fault) proposals.² But, as Fleming James recognized a half century ago, proposals for judicial, as opposed to legislative, adoption fare better if they are less sweeping, so that they fit within a “process of growth well within the framework of our common law tradition.”³ We believe that our draft judicial opinion demonstrates that adoption of a supermarket enterprise liability meets this criterion. Before presenting that opinion, however, we turn in Section II to a discussion of that common law tradition—and the jurisprudential pedigree that is the predicate for the judicial lawmaking role implicit in our proposal.

II. THE JURISPRUDENTIAL PEDIGREE

The conception of the judicial lawmaking role that supports adoption by courts of an enterprise (no-fault) liability approach is rooted in the tradition of the great judges who have shaped, and continue to shape, our

1. 1 AM. LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 35 (1991) [hereinafter 1 ALI REPORTERS' STUDY]; 2 AM. LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 534 (1991) [hereinafter 2 ALI REPORTERS' STUDY].

2. VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 168–77 (1995); Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975); Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 773 (1973); see also Virginia E. Nolan & Edmund Ursin, *Strict Tort Liability of Landlords: Becker v. IRM Corp. in Context*, 23 SAN DIEGO L. REV. 125 (1986) (discussing *Becker v. IRM Corp.* 698 P.2d 116, 116 (Cal. 1985) (adopting doctrine of landlord strict tort liability)).

3. Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 924 (1957).

law: Chief Justice Lemuel Shaw, Justice Oliver Wendell Holmes, Justice Roger Traynor, and Judge Richard Posner. Stated most simply, when it comes to the common law, this conception of the judicial role holds that it is the *job* of judges to continually reshape the law in order to meet, in Holmes's words, the "felt necessities of the time."⁴ As Judge Posner has succinctly written, an "appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one."⁵ In this process, the goal is making the choices that will produce "the best results for the future."⁶

This conception of the judicial lawmaking role can be traced to Chief Justice Shaw of Massachusetts, who during his thirty year tenure, from 1830 to 1860, shaped the common law—including the tort law—of his time. Shaw, for example, wrote *Brown v. Kendall*,⁷ the cornerstone of negligence law, and in *Farwell v. Boston & Worcester Railroad Corp.*⁸ adopted the fellow servant rule and the defense of assumption of the risk. In these, and in a myriad of other decisions, the essence of Shaw's view of the judicial role was that judges should adapt the common law to the felt needs of American society.

Holmes shared Shaw's vision of the judicial role and wrote that "the strength of that great judge lay in [his] accurate appreciation of the requirements of the community . . . [and in his] understanding of the grounds of public policy to which all laws must ultimately be referred."⁹ Perhaps the most striking articulation of this perspective is found in Holmes's *The Path of the Law*,¹⁰ which Judge Posner has called Holmes's greatest essay.¹¹ Writing in 1897, the same year that England enacted its workers' compensation legislation, Holmes suggested that *courts* might reconsider the requirement that employees prove negligence in cases involving injuries received in the course of their employment. He wrote that "even now our theory upon this matter is open to

4. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963) [hereinafter HOLMES, *THE COMMON LAW*].

5. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 248–49 (1999) [hereinafter POSNER, *PROBLEMATICS*].

6. *Id.* at 241. See generally RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) [hereinafter POSNER, *DEMOCRACY*].

7. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

8. *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (1 Met.) 49 (1842).

9. HOLMES, *THE COMMON LAW*, *supra* note 4, at 85.

10. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *Path*].

11. POSNER, *PROBLEMATICS*, *supra* note 5, at vii.

reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed.”¹²

Holmes is perhaps most identified with his famous 1906 dissent in *Lochner v. New York*¹³ and his warning against the danger of judicial “activism.” *Lochner*-style activism, however, involved constitutional decisions, with courts cutting back on the power of the legislature. No such restriction on legislative power occurs when courts adopt, modify, or revise common law rules. Thus, for Holmes, there was no inconsistency in calling for deference to the legislature in constitutional decisionmaking while insisting on a creative role for courts when it came to the common law. Indeed, he addressed both themes in *The Path of the Law*.

Nevertheless, by the time Justice Traynor commenced his thirty-year tenure on the California Supreme Court in 1940, the clear vision of the creative role of the common law judge held by Shaw and Holmes had become obscured by the revulsion over *Lochner*-style activism. Thus scholars largely ignored Traynor’s 1944 proposal in *Escola v. Coca Cola Bottling Co.* that courts adopt a doctrine of strict products liability. Moreover, by the 1950s, the “legal process” school of jurisprudence had become dominant in the academy, and scholars had generalized their *Lochner*-inspired concerns over judicial activism (in constitutional law) to include the common law.¹⁴ These scholars insisted that judicial lawmaking be confined to “reasoned elaboration [from] existing arrangements,”¹⁵ that it strive to be “neutral,”¹⁶ “nonpolitical,”¹⁷ and “noncontroversial.” Fearing “the specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity,”¹⁸ legal process scholars objected that “a sharp change in our system of compensation of accidental injuries, shifting from the present system with its premise of liability based on fault to a system based on the premise of loss distribution or insurance, is beyond the sphere of desirable judicial creativity.”¹⁹

12. Holmes, *Path*, *supra* note 10, at 467.

13. *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional, under the Due Process Clause, a New York state law limiting work hours in bakeries to sixty per week and ten per day).

14. Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 230–43, 286 (1981) [hereinafter Ursin, *Judicial Creativity*].

15. See generally HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 398 (Tentative ed. 1958).

16. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

17. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 43–44 (1969).

18. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 444 (1959).

19. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508 (1962).

Applied to the prospect of courts adopting a strict products liability doctrine, this meant that a “legitimate basis of criticism” exists “when courts take the bold step toward imposing and justifying strict products liability without legislative authorization and assistance.”²⁰

Justice Traynor responded to this legal process handwringing in his extrajudicial writings of the 1950s and 1960s. Building on the foundation laid by Holmes and Shaw, Traynor urged that “[c]ourts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”²¹ Indeed, “[t]he real concern [was] not the remote possibility of too many creative opinions but their continuing scarcity.”²² Moreover, attempts by legal process scholars to invent “magic words”²³ to restrict judicial creativity overlooked the reality of “legislative indifference or legislative sensitivity to political considerations.”²⁴ It was simply “unrealistic to expect that legislators [would] close their heterogeneous ranks for the single-minded purpose of making repairs and renewals in the common law.”²⁵ Thus, according to Traynor, courts have “the major responsibility for lawmaking in the basic common-law subjects,”²⁶ for “the recurring formulation of new rules to . . . displace the old,” and for the “choice of one policy over another.”²⁷

Judge Richard Posner began his academic career just as Justice Traynor retired from the bench in 1970. Upon appointment to the bench in 1980, Posner turned his attention to the lawmaking role of courts, publishing numerous articles and a trilogy of books that appeared in the 1990s.²⁸ Unlike academics of the “post-Legal Process” era who “spun”

20. Richard E. Speidel, *The Virginia “Anti-Privity” Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 845 n.103 (1965).

21. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 232; see also Ursin, *Judicial Creativity*, *supra* note 14, at 243–50 (1981) (discussing Traynor’s view of judicial lawmaking).

22. Roger J. Traynor, *Comment*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 52 (Monrad G. Paulsen ed., 1959) [hereinafter Traynor, *Comment*].

23. Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 616 (1961) [hereinafter Traynor, *Magic Words*].

24. *Id.* at 618.

25. *Id.*; see also Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 402 (1968).

26. Traynor, *Magic Words*, *supra* note 23, at 618.

27. R. J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 213 (1967).

28. See RICHARD A. POSNER, *THE PROBLEM OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); RICHARD A. POSNER,

legal process themes to achieve their substantive agendas,²⁹ Posner placed himself squarely in the Holmesian tradition. For example, he describes his 1999 book, *The Problematics of Moral and Legal Theory*, as “an extended homage to Holmes’s ideas.”³⁰ The goal of the book, he writes, is to “push the engine a bit farther along.”³¹

Echoing Holmes’s famous “[t]he life of the law has not been logic: it has been experience,”³² Posner writes that the judge “can do no better than to rely on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion.”³³ In explicitly embracing (and refining) this Holmesian view of judicial lawmaking, which he calls pragmatic adjudication, Posner’s main focus is not primarily on the common law. Nevertheless, he writes that “in this country, common law judges reserve the right to ‘rewrite’ the common law as they go along.”³⁴ And, in doing this, the wise judge would be “inclined to start with [the sources that would guide his policy choices] to decide . . . the approach that would be best” in a substantive area.³⁵ Moreover, concerns that the creative common law role of courts might infringe upon legislative prerogatives (as is the case in constitutional adjudication) are misplaced because when courts adopt a common law rule, the “legislature can always step in” to prescribe an alternative rule if it disagrees with the judge-made law.³⁶ Indeed, in the common law “a heavy burden of legal creativity falls inescapably on the shoulders of judges” because “American legislatures . . . are so sluggish when it comes to correcting judicial mistakes.”³⁷ These words might well have been written by Justice

OVERCOMING LAW (1995).

29. Ronald Dworkin, for example, has insisted—in line with legal process scholarship—that courts decide cases based on legal principles, not policy. *See, e.g.*, Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–23 (1967). But his “principles” often mirror the policies used by courts to justify doctrines such as strict products liability and market share liability in DES cases. *See, e.g.*, Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 356 (1997) (justifying market share liability based on a principle that “when misfortunes happen as an almost inevitable consequence of some valuable commercial enterprise . . . the loss should . . . be distributed among the class of those who profit from the enterprise”).

30. POSNER, *PROBLEMATICS*, *supra* note 5, at vii.

31. *Id.*

32. HOLMES, *THE COMMON LAW*, *supra* note 4, at 5.

33. POSNER, *PROBLEMATICS*, *supra* note 5, at viii.

34. *Id.* at 259.

35. *Id.* at 246.

36. *Id.* at 247. An example of such an interaction is the legislative overturning of the California Supreme Court’s holding that social hosts who furnish alcoholic beverages to obviously intoxicated persons could be liable to third persons injured by the intoxicated person. *See* Neil M. Levy & Edmund Ursin, *Tort Law in California: At the Crossroads*, 67 CAL. L. REV. 497, 511 (1979).

37. POSNER, *PROBLEMATICS*, *supra* note 5, at 247.

Traynor, who, forty years earlier, wrote:

The real concern is not the remote possibility of too many creative opinions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar. . . . Massive anachronisms endure . . . , their venerability discouraging judges from voicing the rude possibility that they may have reached retirement age.³⁸

The views of both resonate with the legal historian Willard Hurst's description of the great men in law as those who have had an ability "to express their time or foretell the generation to come. . . . [T]hey saw better where the times led and took their less imaginative, less flexible, or less courageous brethren in that direction faster and with a minimum of waste and suffering."³⁹

This, then, is the jurisprudential pedigree for the lawmaking role that is the predicate for the adoption by courts of our proposed supermarket enterprise liability doctrine. In Section III of this Article, we present a "draft judicial opinion" that demonstrates "the capacity of the ablest in the judiciary to improve their creation of . . . tort liability," by addressing the "three crushing and intertwined liabilities of tort liability itself . . . its uncertainties, delays, and transaction costs"⁴⁰ Adoption of this doctrine would serve the "deterrent and compensatory objectives of tort law"⁴¹ by providing a "better blend" of "efficient compensation, economical administration, and effective [accident] prevention,"⁴² and thus address "tort law's essential shortcomings."⁴³

We close this section with a reminder to those who remain skeptical

38. Traynor, *Comment*, *supra* note 22, at 53.

39. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 17–18 (1950). Judge Posner has written that the "most influential judges . . . change the law or . . . make new law where there was none before" POSNER, *DEMOCRACY*, *supra* note 6, at 85–86. Judge Henry Friendly wrote of Justice Traynor that "no other judge of his generation matched Traynor's combination of comprehensive scholarship, sense for the 'right' result, craftsmanship, and versatility." Henry J. Friendly, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1040 (1983). In a similar vein, Judge Posner has written that Judge Friendly "was the greatest federal appellate judge of his time—in analytic power, memory, and application perhaps of any time." Richard A. Posner, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1724 (1986).

40. Jeffrey O'Connell, *Commentary: Judges and Real Tort Reform Concerning Uncertainty, Delays and Transaction Costs*, 49 DEPAUL L. REV. 497, 497 (1999).

41. POSNER, *PROBLEMATICS*, *supra* note 5, at 254.

42. 1 ALI REPORTERS' STUDY, *supra* note 1, at 35; 2 ALI REPORTERS' STUDY, *supra* note 1, at 534.

43. O'Connell, *supra* note 40, at 501.

that a court might abandon the defect requirement and fault-based defenses and limit damages—despite possibly finding our proposed doctrine *substantively* desirable.⁴⁴ In this regard, it is instructive to recall that leading scholars of an earlier generation thought it inconceivable that courts would adopt doctrines of strict products liability and comparative negligence virtually on the eve of their adoption. Prosser, for example, wrote in 1960, the year *Henningsen*⁴⁵ was decided, that judicial adoption of a general doctrine of strict products liability was so “radical and disruptive” that it might “very possibly be the law of fifty years ahead.”⁴⁶ Similarly, Clarence Morris, another leading torts scholar of the time,⁴⁷ wrote in 1965 that there was “no substantial likelihood that any court will act today . . . to [adopt] comparative negligence.”⁴⁸ Indeed, this seemed so obvious to Morris that he asserted that “lawyers will not even consider arguing [the] possibility [of judicial adoption of comparative negligence] to a court.”⁴⁹ And Prosser concluded in 1971 that there was little likelihood of that occurring⁵⁰—only to be proven wrong two years later when the Florida Supreme Court did just that⁵¹ and was quickly followed by the California⁵² and Alaska Supreme Courts.⁵³

In our view, courts are quite capable of adopting enterprise (no-fault) liability approaches as a “natural and easy extension” of existing doctrine.⁵⁴ They did just that in extending strict products liability from food to products generally. And the following draft judicial opinion illustrates how, in a similar manner, courts could adopt a supermarket enterprise liability doctrine.

44. Scholars who favor legislative compensation plans tend to assume that courts are “stuck with the administrative apparatus of [traditional] tort law, [including] the rules of damages,” see STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 36 (1989); 1 ALI REPORTERS’ STUDY, *supra* note 1, at 29–30, and a requirement of negligence (or defectiveness). 1 ALI REPORTERS’ STUDY, *supra* note 1, at 29.

45. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

46. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960).

47. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 5 n.14 (1987).

48. PAUL J. MISHKIN & CLARENCE MORRIS, *ON LAW IN COURTS* 256 (1965).

49. *Id.*

50. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 434–35 (4th ed. 1971).

51. See *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973) (adopting comparative negligence).

52. See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975) (holding that “all-or-nothing” rule of contributory negligence should be superceded by a system of “pure” comparative negligence).

53. See *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975) (replacing the doctrine of contributory negligence with the principle of comparative negligence).

54. James, *supra* note 3, at 924.

III. A DRAFT ENTERPRISE (NO-FAULT) LIABILITY “OPINION”⁵⁵**IN RE SUPERMARKET ENTERPRISE
(NO-FAULT) LIABILITY**

In this opinion we consider appeals from two cases. In one case the plaintiff slipped and fell in defendant’s supermarket on a green bean. Because the plaintiff was rendered unconscious by her fall and bystanders focused on the plaintiff’s condition, no one was able to describe the condition of the green bean. The trial court dismissed the complaint on the ground that plaintiff was unable to prove the length of time the green bean had been on the floor prior to her injury—and thus in the trial court’s view was unable to prove the defendant supermarket had constructive notice of the dangerous condition of the floor.

In the second case plaintiff, a small child, was injured when the shopping cart, in which he was seated, tipped over, causing him to hit his head on the floor. The plaintiff claimed that the shopping cart’s defective design caused it to tip over. His action against defendant supermarket is based on strict products liability. The trial court dismissed this claim on the ground that defendant supermarket did not manufacture, sell, or lease the shopping cart, and thus is outside the chain of marketing and distribution of the product and not subject to strict products liability.

In this appeal, plaintiff in the slip and fall case argues that the trial court’s dismissal of the complaint is inconsistent with this court’s recent decision in *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 114 Cal.Rptr.2d 470, 36 P.3d 11, in which we held that a plaintiff need not establish how long a dangerous condition existed prior to injury in order to establish constructive notice of the dangerous condition. In *Ortega*, we concluded that evidence of the owner’s failure to inspect the

55. This draft opinion is written in the style of a California Supreme Court opinion, drawing primarily on California case law to illustrate doctrinal and policy themes. The California Supreme Court has played a pathbreaking role in the development of tort law for more than four decades. Its decisions have served as the starting point for courts that have followed—and at times rejected—its lead. Compare *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878–79 (Alaska 1979) (adopting California’s two-prong defective design test) with *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992) (rejecting California’s exemption of prescription drugs from scrutiny under the two-prong defective design test). See also *Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 767–68 (La. 1999) (following *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 213–15 (Cal. 1993)).

premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it. With our *Ortega* decision we joined the growing number of jurisdictions that have responded to the unfairness of imposing on accident victims the sometimes impossible burden of proving how long prior to an injury a dangerous condition existed.

Our approach in *Ortega* resembles what has been called the “mode of operation” rule, under which a supermarket that can reasonably anticipate that dangerous conditions (such as littered aisles) will regularly arise must anticipate and must exercise reasonable care to guard against those dangers (by, for example, frequently inspecting its aisles). (See, e.g., *Sheil v. T.G. & Y. Stores Co.* (Mo. 1989) 781 S.W.2d 778, 780.) Under the mode of operation rule, the precise time that an object has been in the aisle is not controlling—and constructive notice itself need not be established. (*Ibid.*)

Defendant objects that our *Ortega* holding and similar approaches allow juries to impose what would be, in effect, strict liability. A green bean, for example, might have fallen in the aisle two minutes before plaintiff slipped on it. Yet if the store only inspected the aisles every hour and a jury was to conclude that the aisles should have been inspected every half hour, liability could be imposed even though the store’s negligence may not have caused the accident. In other words, a “storekeeper’s failure to inspect the premises does not necessarily lead to the conclusion that the dangerous condition existed long enough that he would have discovered it had he acted reasonably to inspect the premises.” (Winegar, *Comment, Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case* (1994) 41 UCLA L.Rev. 861, 878 (hereafter Winegar, *Reapportioning the Burden of Uncertainty*).) Thus commentators have concluded that these rules sanction “imposing something close to strict liability.” (Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law* (1992) 26 Ga. L.Rev. 601, 652 (hereafter Schwartz, *Modern Tort Law*).) We note that a similar objection was considered in our *Ortega* decision. We wrote at the time that “neither . . . social and economic consequences, nor scholarly criticisms suggest [our *Ortega*] rule is unsound or unworkable.” (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1211, 114 Cal.Rptr.2d 470, 36 P.3d 11.)

In the shopping cart case, plaintiff points out that it is “hornbook law” that strict liability applies to business premises that fall within the “license to use” category of strict products liability. A leading case is the Court of Appeal decision in *Garcia v. Halsett* (1970) 3 Cal.App.3d 319, 321–322, 82 Cal.Rptr. 420, in which plaintiff was injured when his

hand was caught in an allegedly defective washing machine at a laundromat. In holding that the operator was subject to strict products liability, the court wrote that although defendant “is not engaged in the distribution of the product, in the same manner as a manufacturer, retailer or lessor, he does provide the product to the public for use by the public, and consequently does play more than a random and accidental role in the overall marketing enterprise of the product in question.” (*Id.* at 326, 82 Cal.Rptr. 420.)

In tacitly approving the *Garcia* holding, our court has characterized *Garcia* as holding that the owner of the launderette, “‘in the same manner as a manufacturer, retailer, or lessor,’ was strictly liable in tort.” (*Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 476, 85 Cal.Rptr. 629, 467 P.2d 229 [citing *Garcia v. Halsett*, *supra*, 3 Cal.App.3d at p. 326].) Plaintiff asserts that defendant supermarket should likewise be subject to strict liability, arguing that the use of a shopping cart is like the use of a washing machine. Defendant supermarket counters that the laundromat case is distinguishable. In fact, *Prosser and Keeton* sees it as “quite different” because the laundromat is “engaged in the very business of licensing the use of property on their premises and charging for that use.” (Prosser & Keeton on Torts (5th ed. 1984) p. 719.)

In these appeals we adopt a supermarket enterprise liability doctrine that makes it unnecessary for us to pursue the areas of dispute described above. Under this doctrine, supermarkets are liable (but with damages limitations) for personal injuries arising out of the use of their premises by visitors to those premises. The doctrine covers both the slip-and-fall and shopping cart cases since the injuries in each of those cases arose out of the use of supermarket premises.

The supermarket enterprise liability rule we adopt derives from the doctrine and policies of strict products liability. As we will explain, the doctrinal framework exists for this rule, which is a natural and easy extension of existing precedent. We take this occasion, however, to reassess the policies of victim compensation, loss spreading, and prevention of accidents, upon which strict products liability has been premised, in light of the scholarly literature that has developed since our early landmark deployment of these policies. We find many of the criticisms of these policies to be sound. We conclude, however, that we should adjust, not abandon, these tort policies. As we will explain, these policies, when adjusted, support our application of strict liability to supermarkets, but only in a modified form. Thus we hold that

supermarkets are subject to a strict enterprise liability for personal injuries arising out of the use of their premises by visitors to those premises. Under this doctrine, victim compensation is not dependent on proof of defect (or negligence), recoverable damages are limited, and victim-fault defenses are eliminated. As we will explain, each of these adjustments in doctrine is supported by precedent, as well as policy. Our supermarket doctrine, better termed *supermarket enterprise liability*, will achieve the “better blend” of “efficient compensation, economical administration, and effective prevention” that is the hallmark of a fair, balanced tort regime. (See American Law Institute, 1 Reporters’ Study: Enterprise Responsibility for Personal Injury (1991) p. 35 [hereafter 1 ALI Reporters’ Study]; American Law Institute, 2 Reporters’ Study: Enterprise Responsibility for Personal Injury (1991) p. 534 [hereafter 2 ALI Reporters’ Study].) (Our recognition of a supermarket enterprise liability does not necessarily preclude the retention of a residual cause of action for what Albert Ehrenzweig called “reprehensible conduct” under which traditional tort damages would be available. (See Ehrenzweig, *Negligence Without Fault* (1966) 54 Cal. L.Rev. 1422, 1428 (hereafter Ehrenzweig, *Negligence*). See also O’Connell & Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah* (1999) 32 Conn. L.Rev. 137, 150.))

1. *The Doctrinal Framework Supporting Supermarket Strict Liability*

Beginning with our 1963 *Greenman* decision, this court has applied the strict products liability doctrine in situations in which the underlying policies of loss spreading and accident prevention supported its application. (See *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897.) Thus we quickly, and without dissent, endorsed the application of strict liability to manufacturers, retailers, wholesalers, and lessors of products. (See generally Prosser & Keeton, *supra*, at p. 719–720.) Describing the extension to lessors, *Prosser and Keeton* notes that the “policy arguments in support of strict liability—accidental prevention, enterprise risk-shifting capacity and difficulties of proving negligence—have especial relevance to the rental agency.” (*Id.* at p. 718.) According to *Prosser and Keeton*, it is also “hornbook” law that strict liability applies to business premises cases that fall within the “license to use” and “hybrid sales-service” categories of strict products liability. (*Id.* at pp. 719–720.) Thus strict liability applies to a laundromat when a washing machine malfunctions, *Garcia v. Halsett*, *supra*, 3 Cal.App.3d 319, 82 Cal.Rptr. 420, or a beauty parlor when a defective permanent wave

solution is applied to a patron. (*Newmark v. Gimbel's Inc.* (1969), 54 N.J. 585, 258 A.2d 697.) It would seem a small step to apply a broader business premises strict liability to cases that fail to fit precisely into the "license to use" and "hybrid sales-service" categories. Thus Professor Stephen Sugarman has asked: "[I]f the roof falls in or a shelf falls over in a Wal-Mart store, would it not be as appropriate to invoke a concept of 'defective premises' . . . as it is to invoke strict liability against General Motors for one of its defective Buicks?" (Sugarman, *A Restatement of Torts* (1992) 44 Stan. L.Rev. 1163, 1194.) We think that it would.

The authors of *Prosser and Keeton* assert that the use of a washing machine in a laundromat is "quite different" from the use of a shopping cart in a supermarket because the laundromat is "engaged in the very business of licensing the use of property on [its] premises and charging for that use." (Prosser & Keeton, *supra*, at p. 719.) Of course, supermarket patrons also are charged for the use of shopping carts, albeit indirectly through grocery prices. We are unimpressed by the *Prosser and Keeton* distinction, which, if taken seriously, would distinguish shopping carts in grocery stores from luggage carts at airports (where a fee is directly charged). Moreover, we note that strict liability has been imposed in shopping cart cases. (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 146 Cal.Rptr. 550, 579 P.2d 441.)

The *Prosser and Keeton* authors insist on their distinction because, in their view, there is "little, if any, difference between using a defective shopping cart and using a slippery floor." (Prosser & Keeton, *supra*, at p. 719.) We agree, but our conclusion is that strict liability should be applied to both. Professor Gary Schwartz has noted that "in one line of [slip and fall] cases that has acquired prominence since the early 1980s, courts have perceived that self-service retail stores involve a 'mode of operation' that is especially likely to generate litter." (Schwartz, *Modern Tort Law*, *supra*, at pp. 651–652.) He reported that these cases "can permissibly be read as imposing something close to strict liability." (*Id.* at p. 652.) Moreover, a 1994 analysis building on Schwartz's work suggests that as many as ten jurisdictions had by that date reached similar results. (Winegar, *Reapportioning the Burden*, *supra*, at pp. 888–891.) And as our *Ortega* decision demonstrates, the number of jurisdictions adopting similar approaches continues to grow. (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th 1200, 114 Cal.Rptr.2d 470, 36 P.3d 11.) These cases suggest a judicial willingness to impose strict liability in slip

and fall cases, thus obviating the need for the strained distinctions required by the *Prosser and Keeton* analysis. The cases also suggest that courts might wish to single out self-service retail stores for the application of strict liability.

As we will explain, in this case we adopt such a doctrine, but limit it to supermarkets, while also modifying traditional strict liability by eliminating the defect requirement and fault-based defenses and modifying damages rules. First, however, we assess the policy bases on which our rule rests.

2. *Reevaluating the Policies of Strict Liability*

While the doctrinal framework exists for the application of strict liability in cases of supermarket accidents, the crucial question is whether such a strict liability rule would be sound as a matter of social policy. As noted, the primary policies on which that framework was built are the compensation of accident victims, spreading losses over society, and the increased safety incentives that a strict liability rule would induce.

In recent years, however, each of these policy justifications has been called into question. It is, therefore, necessary to assess whether the policy basis for strict liability remains viable.

a. *Victim Compensation and Loss Spreading*

In recent years tort critics have argued that the prevalence of first-party insurance has obviated the need for compensation through the tort system. These critics also assert that *tort law* is a flawed vehicle for providing whatever compensation is needed for accident victims who are uninsured or underinsured. The 1991 American Law Institute *Reporters' Study*, for example, asserted that the “use of tort law as a device for expanding insurance protection against disabling injuries is . . . questionable . . .” (1 ALI *Reporters' Study*, *supra*, at p. 30.)

Contemporary critics of the victim compensation and loss spreading goals argue that compensation through the tort system is overgenerous because it includes large awards for pain and suffering, and because the collateral source rule permits recovery of amounts covered by first-party insurance. (*Id.* at p. 29; Priest, *Modern Tort Law and Its Reform* (1987) 22 Val. U. L.Rev. 1, 15 (hereafter Priest, *Tort Law and Its Reform*); Schwartz, *The Ethics and the Economics of Tort Liability Insurance* (1990) 75 Cornell L.Rev. 313, 361 (hereafter Schwartz, *Tort Liability Insurance*)). Moreover, tort awards are based on the size of a victim's prior earnings, although everyone, rich and poor alike, pays the same

price for products and services. Thus, tort liability has a regressive distributional effect. (1 ALI Reporters' Study, *supra*, at p. 30; Priest, *Tort Law and Its Reform*, *supra*, at pp. 17–18; Schwartz, *Tort Liability Insurance*, *supra*, at p. 361.)

Critics also argue that tort law is incapable of providing compensation swiftly and efficiently. Even strict products liability requires that a product be proven defective, and experience has shown that this determination may result in a balancing of risks and benefits similar to negligence law and (especially when combined with determinations of victim fault and pain and suffering damages) produce litigation and delay. (2 ALI Reporters' Study, *supra*, at p. 39.) These realities lead critics to conclude that the tort system is expensive, inefficient, and incapable of producing the assurance of prompt compensation that is implicit in the loss spreading goal.

We believe that these criticisms have merit, but they point not to a rejection of the loss spreading and victim compensation policies, but to an adjustment in their application. Specifically, they point to the elimination of the defect requirement (and fault-based defenses) and to a limitation on recoverable damages in a strict (enterprise) liability regime.

We note at the outset, however, that the claim that existing first-party insurance provides sufficient compensation for accident victims (see Priest, *The Current Insurance Crisis and Modern Tort Law* (1987) 96 Yale L.J. 1521, 1586–1587) is unpersuasive and not supported by empirical data. The ALI Reporters' Study found that in 1991 “[a]t least 30 million individuals in this country [were] without insurance for health care.” (1 ALI Reporters' Study, *supra*, p. 156.) By 1999, the figure was 43.4 million, and by the end of 2003 stood at 43.5 million. (See Kilborn, *Uninsured in U.S. Span Many Groups*, N.Y. Times (Feb. 26, 1999) p. A1; Brownstein, *Shortsighted States Are Putting Health Care on the Chopping Block*, L.A. Times (Dec. 22, 2003) p. A13.) Moreover, the Reporters' Study notes that “another 10 to 20 million [were] significantly underinsured.” (1 ALI Reporters' Study, *supra*, at p. 156.)

The Reporters' Study concludes that “[i]t would be rash . . . to dismiss out of hand the role that tort damage awards play in providing a form of health care insurance for the victims of enterprise injuries.” (*Ibid.*) Moreover, “an even starker gap [in the social safety net] confronts people who lose earnings due to injury.” (*Id.* at p. 44.) With respect to disability and life insurance, the study reports that “[d]isability insurance—particularly long-term disability insurance—is not widespread.”

(*Id.* at p. 163.) Furthermore, “life insurance . . . probably does not provide a substantial economic cushion to the families of most breadwinners upon their death[s].” (*Ibid.*) Thus, the *Reporters’ Study* concludes that “compensation paid to the victims of injury . . . from all sources is far from adequate.” (*Ibid.*)

We also believe that tort law, specifically the supermarket strict enterprise liability we are adopting, is an appropriate vehicle to deliver the compensation that is needed. First, as we will discuss in detail below, the defect requirement and fault-based defenses should be discarded in the supermarket enterprise liability doctrine, thus removing one obstacle to prompt, efficient compensation through the tort system. The traditional damages award should also be modified in order to assure prompt compensation, and, as we next discuss, remove the overgenerous and regressive aspects of tort awards.

We agree with tort critics that the prevalence of first-party insurance and the regressive distributional effect of tort liability call for a rethinking of the role of victim compensation and loss spreading in tort law. In our view, however, an adjustment in the application of these policies, not their rejection, is the consequence of this rethinking.

The need for victim compensation, for example, does not necessarily justify the existing tort damages award in an enterprise liability regime that provides the assurance of victim compensation. In fact, the scholars whose scholarship provided the foundation for the judicial adoption of strict products liability linked their proposed strict liability to limitations on recoverable damages—including the elimination or limitation of recovery for pain and suffering and an abolition of the traditional collateral source rule. (See, e.g., James, *Damages in Accident Cases* (1956) 41 Cornell L.Q. 582; 2 Harper & James, *The Law of Torts* (1956) § 25; James, *Some Reflections on the Bases of Strict Liability* (1958) 18 La. L.Rev. 293. See generally Ehrenzweig, *Negligence*, *supra*, at p. 1423; Jaffe, *Damages for Personal Injury: The Impact of Insurance* (1953) 18 Law and Contemp. Probs. 219; Plant, *Damages for Pain and Suffering* (1958) 19 Ohio St. L.J. 200.)

Justice Traynor, the architect of this court’s strict liability regime, dissenting in the 1961 case of *Seffert v. L.A. Transit Lines* (1961) 56 Cal.2d 498, 509, 15 Cal.Rptr. 161, 364 P.2d 337 (dis. opn. of Traynor, J.), urged courts to recognize the damages implications of the enterprise liability theory by limiting the size of damage awards for pain and suffering. Echoing Professor Jaffe, Traynor wrote that damages for pain and suffering “become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation.” (*Id.* at p. 511). Like Jaffe and James, Traynor did not see courts as

powerless to limit pain and suffering awards. He suggested in *Seffert* that, as a general guideline, “ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses.” (*Id.* at p. 512).

b. Safety Incentives

A decade after our *Greenman* decision, law and economics scholars, most notably (now Judge) Richard Posner, cast doubt on the claim that a strict liability regime creates safety incentives superior to those existing under negligence law. Prior to Posner’s writing, it had been widely assumed that strict liability created greater safety incentives because, for example, a business enterprise “forced to bear all accident costs . . . will have an incentive to find the optimal accident level for [its] product.” (Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal* (1972) 24 Stan. L.Rev. 439, 462. See also Baxter & Altree, *Legal Aspects of Airport Noise* (1972) 15 J.L. & Econ. 1 [presenting an economic analysis of the problem of airport noise].)

Posner, however, demonstrated that “[e]conomic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability.” (Posner, *Strict Liability: A Comment* (1973) 2 J.L. Studies 205, 221 (hereafter Posner, *A Comment*).) Thus, contrary to a decade of thinking, economic analysis failed to establish any reason to move toward a regime of strict liability rules. (Now Judge) Guido Calabresi had responded to Posner’s position by arguing that in practice, as opposed to theory, strict liability would optimize accident costs. (See Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts* (1972) 81 Yale L.J. 1055, 1059.) Posner’s retort was that Calabresi had established only that the “question whether a general substitution of strict [liability] for negligence . . . would improve efficiency [is] at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done.” (Posner, *A Comment*, *supra*, at pp. 211–212.)

The theoretical debate continues to this day, with economic analysis yielding wildly divergent conclusions in the hands of leading law and economics scholars. For some, the efficiency premise points to absolute manufacturer liability without a defect requirement. (See generally Croley & Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability* (1993) 91 Mich. L.Rev. 683 [discussing strict liability and negligence standards] (hereafter Croley & Hanson,

Rescuing the Revolution).) For others, it points to a negligence rule (See, e.g., 2 ALI Reporters' Study, *supra*, at pp. 15–16 [discussing product design defects]) or even rules more restrictive than negligence. (Compare Epstein, *The Unintended Revolution in Product Liability Law* (1989) 10 Cardozo L.Rev. 2193, 2206–2212, and Priest, *Tort Law and Its Reform*, *supra*, at pp. 23–33, with Croley & Hanson, *Rescuing the Revolution*, *supra*, at pp. 727, 370 [stating that Epstein's "prescription translates to a proposal that courts should return to . . . a standard approaching (the Winterbottom rule)" and that "Priest's arguments strongly suggest that courts should adopt a mutable, absolute consumer liability regime . . ."].)

As Professor Gregory Keating has recently observed, "[e]conomics supplies us with a complex and indeterminate framework, and it permits a variety of approaches to any particular problem." (Keating, *The Idea of Fairness in the Law of Enterprise Liability* (1997) 95 Mich. L.Rev. 1266, 1281. See also Moorhouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion* (1998) 62 Alb. L.Rev. 667, 694 (1998) [reporting that "no grand consensus about (the efficiency of) common law tort rules" emerged from the authors' survey of members of the American Law and Economics Association].)

Fortunately, in appraising our new doctrine of defect-free strict liability we do not need to rely on economic theory. The application of our strict (enterprise) liability rule to supermarkets imposes a liability regime similar to workers' compensation plans, which also limit damages and do not require negligence or a defect as a predicate to compensation.

While the debate among tort theorists has been over the deterrence differences between tort doctrines of strict liability and negligence, the ALI Reporters' Study points out that workers' compensation, in addition to providing "social insurance for guaranteed compensation," 1 ALI Reporters' Study, *supra*, at page 121, "has been carefully designed to enhance the battery of incentives trained on employers." (*Id.* at p. 122.) The "expectation is that . . . [the incentives created by workers' compensation] will, over a period of time, lead to a safer and healthier workplace." (*Id.* at pp. 122–123.) Turning from theory to empirical studies of the safety effects of workers' compensation, the study reports that the "most thorough and sophisticated analysis of this problem" (Moore & Viscusi, *Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability* (1990) pp. 33–36) has determined that "the existence of [workers' compensation] at its current level of benefits has [had] a powerful safety effect, reducing workplace fatality rates alone by 25 percent from what they would have been if the system was not in place." (1 ALI Reporters' Study, *supra*, at p. 124.

See also, Dewees et al., Exploring the Domain of Accident Law: Taking the Facts Seriously (1996) 353 [relying in part on Moore & Viscusi, *supra*, and noting that the operation of workers' compensation reduces worker injury rates more than the tort system would].) The *Reporters' Study* concludes that these plans have "a powerful safety effect" that stems "from the fact that . . . compensation is provided through a liability system that requires a causal connection between an employee's injury and a particular employer's operation." (1 ALI Reporters' Study, *supra*, at pp. 124–125. See Abraham, The Forms and Functions of Tort Law (2d ed. 2002) p. 242.)

The *Reporters' Study* concludes that liability systems based on the workers' compensation (third-party liability) model—which our new doctrine is—offer a "better blend," 1 ALI Reporter's Study, *supra*, at p. 35, of "efficient compensation, economical administration, and effective [accident] prevention." (2 ALI Reporter's Study, *supra*, at p. 534.) Negligence law may efficiently achieve the injury prevention goal, as might strict liability, but no one claims that it also gives the promising blend of "efficient compensation [and] economical administration" that no-fault provides.

3. *Defect, Damages, and Defenses Precedents*

Some who agree with the substance of our elimination of the defect requirement and reformulation of damages law might object that these reforms are so unprecedented that we should refrain from taking these steps. In our view, however, each of these reforms is the logical extension of the case law that has evolved in the decades since *Greenman*.

a. *Elimination of the Defect Requirement*

In contrast to strict products liability, victim compensation under our supermarket enterprise liability doctrine would not turn on whether an enterprise's premises could be characterized as "dangerously defective." Instead, the doctrine would impose a strict enterprise liability for personal injuries *arising out of* the use of such business premises by entrants on those premises. The simplest answer to the claim that this doctrine is an unprecedented change in the law of strict liability is that the hazardous activity strict liability doctrine, which dates back to *Rylands v. Fletcher* (1868) 3 L.R.-E. & I. App. 330, already dispenses

with a defect requirement. And, just as in the case of our doctrine, the application of this doctrine is largely to premises cases. Dispensing with a defect requirement is also the logical extension of our treatment over the years of the defect requirement in products cases—and of the enterprise liability theory out of which strict products liability grew.

For the first half of this century, the primary focus of enterprise liability scholars such as Fleming James was on proposals for automobile compensation plans. Inspired by the enactment of workers' compensation legislation, these scholars envisioned legislatures meeting the problem of the automobile accident with a similar solution. (See Nolan & Ursin, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century* (1995) chs. 3–8.) Only after it became clear in the 1940s that special interests (first insurance companies, and then trial lawyers) had more influence in the legislative process than a good idea thought out and articulated by legal scholars, did enterprise liability scholars turn to the common law—and then only belatedly to strict products liability. (*Id.* at chs. 12–14.) Strict products liability and no-fault compensation plans are thus aspects of a broader enterprise liability theory, and they were recognized as such by their proponents. It is significant, therefore, to note that compensation plans not only dispense with the negligence requirement, but also do not require defectiveness as a prerequisite for compensation.

When scholars in the 1950s wrote about, and our court in 1963 adopted, the doctrine of strict products liability, the defect requirement lurked in the background. While it was clear to those scholars and to our court that the new doctrine was *not* simply a variation of negligence law, negligence concepts have, at times, crept into scholarly writings and judicial opinions. But, as we have repeatedly emphasized, the policies of strict liability are antithetical to negligence concepts.

The most appropriate point of departure in analyzing the defect issue is in the writing of the judicial architect of strict products liability—Justice Traynor. Just as Justice Traynor's 1944 *Escola* opinion proved prophetic with its proposal of strict products liability, *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 461–468, 150 P.2d 436 (conc. opn. of Traynor, J.), so did his 1965 article, addressing the defect issue, point us in the direction in which we have now moved. (Traynor, *The Ways and Meanings of Defective Products and Strict Liability* (1965) 32 Tenn. L.Rev. 363, 375 (hereafter Traynor, *Ways and Meanings*).)

Shortly after Justice Traynor authored the seminal opinion in *Greenman*, *supra*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, which adopted strict products liability, he addressed the defect issue in that 1965 article. In that article Traynor linked the recently adopted strict products liability with the “strict liability . . . for industrial injuries

covered by workmen's compensation, and for injuries caused by ultra-hazardous activities." (Traynor, *Ways and Meanings*, *supra*, at p. 375.) In that context, he anticipated that the defect requirement might unduly impede victim compensation. He thus suggested the possibility that strict liability might be applied to products for which no safer alternative is available, products "whose norm is danger." (*Id.* at p. 368.)

Specifically, Traynor suggested the possibility of imposing strict liability on prescription drug manufacturers for allergic reactions, writing that "[t]he inevitable query is whether a manufacturer should provide for the occasional risk of allergy as a cost of doing business." (*Id.* at p. 369. See also James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability* (1966) 54 Cal. L.Rev. 1550, 1558.) More generally, Traynor advised that "[t]he complications surrounding the definition of a defect suggest [an] inquiry as to whether defectiveness is the appropriate touchstone of liability." (Traynor, *Ways and Meanings*, *supra*, at p. 372.)

This court's case law over the decades has reflected the tensions pointed out by Justice Traynor and points to the soundness of his suggestion that defectiveness is *not* the proper touchstone of liability. In our 1969 decision in *Pike v. Frank G. Hough Co.*, *supra*, 2 Cal.3d at p. 475, 85 Cal.Rptr. 629, 467 P.2d 229, we held that strict liability applied in design cases, and, as part of our opinion, explained our holding by writing that there exists "no rational distinction between design and manufactur[ing] defects], since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so." The "unreasonable danger" language was borrowed from the Restatement (Second) of Torts § 402A. The problem—not perceived at the time—was that if a product were considered defective only if found to be unreasonably dangerous, strict liability would be barely distinguishable from the negligence standard.

Since *Pike*, this court has repeatedly held that our strict liability doctrine is intended to be and is more expansive than negligence law. For example, in our 1972 decision in *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 104 Cal.Rptr. 433, 501 P.2d 1153, we quickly set the record straight. In reaffirming that strict liability applied to design defects, we wrote that the "unreasonably dangerous" language crept into our jurisprudence without fanfare. (*Id.* at p. 129.) Because in practice that requirement "rarely leads to a different conclusion than would have been reached under laws of negligence," we wrote that a plaintiff need

merely prove “that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries.” (*Id.* at p. 133.)

In *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, decided in 1978, we further refined our approach to the design defect issue. In doing so we noted Dean Wade’s criticism of the consumer expectations test—that, at times, a “consumer would not know what to expect, because he would have no idea how safe the product could be made,” *id.* at page 430 (quoting Wade, *On the Nature of Strict Tort Liability for Products* (1973) 44 Miss. L.J. 825, 829)—but did not, as Dean Wade had suggested, abandon that test. Instead, we concluded that the consumer expectations test should not be “the exclusive yardstick for evaluating design defectiveness.” (*Barker v. Lull Engineering Co.*, *supra*, at p. 430 [emphasis added].)

Thus, we offered a two-prong test, the first prong of which was the consumer expectations test: “[A] product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” (*Id.* at pp. 432.) We then recognized an alternative definition of defectiveness: “[A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product’s design embodies ‘excess preventable danger,’ or, in other words, if the jury finds the risk of danger inherent in the challenged design outweighs the benefits of such design.” (*Id.* at p. 430.)

This balancing test resembled the tests suggested by Deans Wade and Keeton, since the word “hindsight” suggests that risk of danger should be measured at the time of trial—not when the product was manufactured or distributed. We went beyond Keeton and Wade, however, by holding that “once the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.” (*Id.* at pp. 431.) Professors James Henderson and Aaron Twerski (later to become Reporters for the Restatement (Third) of Products Liability), have written that our “formulation of the prima facie case for defective design smacks of defect-free liability.” (Henderson & Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect* (1991) 66 N.Y.U. L.Rev. 1263, 1292 (hereafter Henderson and Twerski, *American Products*).)

Paradoxically, in recent years scholars, including Henderson and Twerski, have seen a return to a negligence-like standard in design defect cases, including our cases. (Henderson & Twerski, *Stargazing:*

The Future of American Products Liability Law (1991) 66 N.Y.U. L.Rev. 1332.) Indeed, under the guidance of Henderson and Twerski as Reporters, the *Restatement of Torts (Third): Products Liability* has adopted a negligence-like standard as its design defect test. (See Rest. 3d Torts, Products Liability (1998) § 2(b).) This standard, however, is inconsistent with our case law.

In our 1994 case of *Soule v. Gen. Motors Corp.* (1994) 8 Cal.4th 548, 34 Cal.Rptr.2d 607, 882 P.2d 298, we were asked by GM and the Products Liability Advisory Council as amicus curiae to abandon both *Barker's* consumer expectation test and its shifting of the burden of proof under the excessive preventable danger test—and thus return products liability to negligence principles. We declined this invitation in *Soule* and, thereby, once again affirmed that strict products liability was intended to be and is more expansive than negligence law. We retained (while refining) the consumer expectation test and left intact *Barker's* excessive preventable danger test, with its shifting of the burden of proof.

This review of our products liability decisions demonstrates that over the years we have sought to develop a body of law that is more expansive than negligence law, but, because of the defect requirement, does not impose an absolute liability. This review also demonstrates that the attempt to achieve this middle ground often results in confusion between our strict liability doctrine and negligence law. This confusion (and attendant litigation and expense) is one reason why we are abandoning the defect requirement in our supermarket enterprise liability doctrine—in addition to the fundamental policies of victim compensation, loss spreading, and optimal safety initiatives.

To avoid confusion, however, we wish to reiterate that defectiveness remains a requirement in the realm of products liability law. Without exploring whether the policy justifications we have pointed to support the contention of some torts scholars that at least some products are suited to a regime of absolute liability, see, e.g., Croley & Hanson, *Rescuing the Revolution*, *supra*, at p. 683, we wish to emphasize practical and policy reasons why cases governed by our supermarket enterprise liability doctrine differ fundamentally from products liability cases—and thus why we are confident of the soundness of our defect-free enterprise liability doctrine.

Professors Henderson and Twerski have asserted that the “abandonment of the traditional defect requirement . . . is one significant

step in the evolution of American products liability that our courts will never take.” (Henderson & Twerski, *American Products*, *supra*, at pp. 1329–1330.) They point to the fact that in many accidents more than one product is causally involved. This raises the problem of how to allocate liability among automobile, truck, bicycle, and telephone pole manufacturers in an accident involving all of these products. (*Id.* at p. 1280.) Absent a defect requirement, liability would seem to attach to any product manufacturer whose product is causally related to the injury. However, in this hypothetical the manufacturers of each product mentioned are causally related to the injury. If liability is not to be imposed on all of these (and perhaps other) manufacturers, how does one single out the appropriate manufacturer? The dilemma raised by Henderson and Twerski is not a trivial one. Indeed, it applies also to proposals to extend no-fault insurance to product accidents, as Jeffrey O’Connell, who has made such proposals, has acknowledged. (O’Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal* (1973) 608 Ins. L.J. 495, 505.)

However, our supermarket enterprise liability doctrine avoids the multiple product problem. Like workers’ compensation plans and automobile no-fault liability, it looks to the specified activity or locus of the accident to allocate defect-free enterprise liability. The owners of a supermarket (or its insurer), for example, would compensate a person injured even if several products are causally related to the injury.

Supermarket cases are a more fertile ground for a no-fault enterprise liability than products cases for another reason. In explaining its hesitancy to extend no-fault to consumer products (at least outside such specialized situations as prescription drugs), the ALI *Reporters’ Study* warns that there is “a crucial difference between the consumer product situation and the workplace In the latter [context], the employer . . . made liable has ample control over the circumstances giving rise to the injury and is able to investigate quickly both the causes and effects of any injuries that occur.” (2 ALI *Reporters’ Study*, *supra*, at p. 528.) In the product context, in contrast, once a product has “left the hands of the manufacturer, the consumer is in control . . . and is unconstrained . . . by the manufacturer . . . in the risky use . . . of the product.” (*Ibid.*) Furthermore, “the manufacturer has no ability to investigate what kinds or causes of injuries may have occurred until compensation claims are filed much later.” (*Ibid.*) Supermarket accidents are suitable for the application of no-fault principles because, like the employer in the workplace, the supermarket has “control over the circumstances giving rise to the injury and is able to investigate quickly both the causes and effects of any injuries that occur.” (*Ibid.*)

Thus the logic of the development of strict products liability—including

its fundamental policies—supports liability without a defect requirement in our supermarket enterprise liability, an approach taken for more than a century in hazardous activity strict liability cases.

b. Damages Limitations and Elimination of Victim-Fault Defenses

As we have previously discussed, the policies that justify imposing strict liability (without a defect requirement) also point to the need to limit the damages recoverable under that doctrine—as the foundational enterprise liability scholarship and Justice Traynor’s *Seffert* opinion indicated. (*Seffert v. L.A. Transit Lines*, *supra*, 56 Cal.2d at pp. 509–514, 15 Cal.Rptr. 161, 364 P.2d 337 (dis. opn. of Traynor, J.)) In the decades since *Seffert*, this court has pursued two distinct paths when deciding damages issues. On the one hand, in routine personal injury cases, we have given juries wide latitude in determining the size of awards for pain and suffering, regarding that as a determination of fact initially within the province of the jury. On the other hand, parallel to these decisions, a line of precedent has developed in which this court has restricted recovery in cases of nonpecuniary loss, exercising its lawmaking function, informed by considerations of policy, similar to those articulated by Justice Traynor in his *Seffert* opinion.

In *Seffert*, Justice Traynor questioned the appropriateness of *any* award of pain and suffering damages in a tort system based on compensation and the distribution of losses through insurance, writing that damages for pain and suffering “become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization.” (*Id.* at p. 511.) Nevertheless, in 1961, Traynor felt that the abolition of pain and suffering damage awards would be inappropriate for judicial action: “any change in this regard must await reexamination of the problem by the Legislature.” (*Ibid.*)

Despite this disclaimer, Justice Traynor offered a guideline that would have restricted the size of the award, writing that “ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses.” (*Id.* at p. 512.) This guideline can be seen as an attempt to create a synthesis of previous damages reform proposals by Professors Jaffe, *supra* at 234 (need for appellate control, reality of attorney fees), and Plant, *supra* at 211 (serviceable general

guideline) that would be suitable for judicial adoption. Traynor expressly recognized the need to consider the payment of “attorney fees for which plaintiffs are not otherwise compensated.” (*Id.* at p. 511.) His proposal of a general guideline, limiting pain and suffering damages to the amount of pecuniary loss, assured full plaintiff compensation—after payment of attorney fees—for economic loss, while giving appellate courts control over the size of awards. Traynor, along with other enterprise liability scholars, recognized the need to link damages reforms with the expansion of liability. He wrote in 1965 that “[o]nly if reasonably adequate compensation is assured can the law justify” limitations on pain and suffering damages. (Traynor, *Ways and Meanings*, *supra*, at p. 376.)

In 1977, this court began its development of a line of authority that questioned awards for intangible, nonpecuniary loss. In *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 138 Cal.Rptr. 302, 563 P.2d 858, and *Baxter v. Superior Court* (1977) 19 Cal.3d 461, 138 Cal.Rptr. 315, 563 P.2d 871, we denied recovery for loss of parent-child consortium, citing the “strong policy reasons” that argue against compensation of “intangible, nonpecuniary loss.” (*Borer*, *supra*, 19 Cal.3d at p. 447, 138 Cal.Rptr. 302, 563 P.2d 858.) Such losses were seen as “difficult to measure,” and we wrote that they “can never be compensated” by money damages. (*Id.* at pp. 447–448.) Moreover, “the burden of payment . . . must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance.” (*Id.* at p. 447.)

The *Borer* holding and rationale suggested that this court might next examine the propriety of awarding pain and suffering damages. Indeed, Justice Mosk in his dissent in *Borer* pointed out that the argument that loss of consortium is an intangible nonpecuniary loss, which can never be compensated, is also applicable to pain and suffering. (*Id.* at p. 454 (dis. opn. of Mosk, J.)) He concluded that he was “unable to reconcile . . . [the] settled principles [regarding pain and suffering] with the majority’s description of ‘the inadequacy of monetary damages to make whole the loss suffered.’” (*Ibid.*)

Our court’s response to this line of argument is intriguing. First we stated: “[to] avoid misunderstanding, we point out that our decision . . . does not remotely suggest the rejection of recovery for intangible loss.” (*Id.* at p. 447.) Since the *Borer* rationale clearly *does* suggest precisely this, the most that the quoted sentence can mean is that *Borer* does not *hold* that *all* intangible losses are now disallowed. Immediately after the quoted language, we then emphasized that “each claim must be judged *on its own merits*.” (*Ibid.* [emphasis added].)

While Justice Traynor in *Seffert* had felt that awards of such damages should be curtailed, he believed that the legislature, not the court, should consider the substantive merits of the award. *Borer* invited *judicial* consideration of the merits of the award of damages for pain and suffering.

Five years after *Borer*, our court in 1982 did rule on the merits of awarding pain and suffering damages—in the context of recognizing a new tort cause of action. Employing the *Borer* policy considerations, our court in *Turpin v. Sortini* (1982) 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954, held that pain and suffering damages are not recoverable in a child's claim for wrongful life, although we held at the same time that the child may recover for specific items of economic loss, observing that "a monetary award of general damages . . . cannot in any meaningful sense compensate the plaintiff." (*Id.* at p. 237.)

And three years after *Turpin*, our court approved a dollar limitation on pain and suffering awards in another discrete substantive area—this time upholding the constitutionality of the legislative cap on pain and suffering damages in medical malpractice cases. In our 1985 decision in *Fein v. Permanente Medical Group*, we upheld provisions of the Medical Malpractice Recovery Act, including the \$250,000 cap on noneconomic damages in medical malpractice cases. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 665.) We rejected the claim that the cap on noneconomic damages denied due process, and wrote that "the Legislature possesses broad authority to modify the scope and nature of . . . damages." (*Id.* at p. 157.) We noted that "[t]houghtful jurists [among them, Justice Traynor whom we quoted] . . . have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case." (*Id.* at p. 159.) These scholars, we wrote, had noted "the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers." (*Ibid.* But compare *Helpend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 13, 84 Cal.Rptr. 173, 465 P.2d 61 [noting that policy considerations counseled against judicial abolition of the collateral source rule, and that the proposed changes, "if desirable, would be more effectively accomplished through legislative reform"].)

In our 1989 decision in *Thing v. La Chusa* (1989) 48 Cal.3d 644, 257

Cal.Rptr. 865, 771 P.2d 814 (limiting causes of action for negligent infliction of emotional distress), we characterized our *Borer* decision as “one of policy. . . . Crucial to the *Borer* decision were the intangible nature of the loss, the inadequacy of monetary damages to make whole the loss, the difficulty in measuring the damage, and the societal cost of attempting to compensate the plaintiff.” (*Id.* at p. 665.)

Turpin v. Sortini, *supra*, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954, was characterized in *Thing* as another instance where our court had “recognized the need to limit recovery of monetary damages for intangible loss” (*Thing v. La Chusa*, *supra*, 48 Cal.3d at p. 665.) In limiting damages to economic loss, the court in *Turpin* had “observed that ‘a monetary award of general damages . . . cannot in any meaningful sense compensate the plaintiff.’” (*Ibid.* [quoting *Turpin v. Sortini*, *supra*, 31 Cal.3d at p. 237].) In *Thing*, we once again utilized the “policy bases” of *Borer*—this time to limit the class of plaintiffs who can recover as bystanders in actions for negligent infliction of emotional distress. (*Id.* at p. 665.)

Thus a long line of precedent supports our consideration of the propriety of pain and suffering awards in the enterprise liability doctrine we are adopting. Moreover, it bears emphasizing that the damages limitations of our supermarket enterprise liability, like those in *Turpin*, are imposed in the interest of expanding the number of accident victims who can receive tort compensation, with one major difference: here we are relieving accident victims of the need to prove negligence or defect. Thus this damages limitation is supported not only by the reasons employed in *Borer*, *Turpin*, *Fein*, and *Thing*, but also by the goal of providing, in the words of the ALI Reporters’ Study, the “better blend,” 1 ALI Reporters’ Study, *supra*, at p. 35, of “efficient compensation, economical administration, and effective prevention” delivered by compensation plans. (2 ALI Reporters’ Study, *supra*, at p. 534. See also Traynor, *Ways and Meanings*, *supra*, at p. 376.)

Turpin was not the first case in which we have, for policy reasons, limited damages while significantly expanding the number of plaintiffs who could be compensated through the tort system. In abolishing the defense of contributory negligence, our 1975 decision in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, did just that by allowing negligent plaintiffs, previously barred from receiving any damages, to recover an amount reduced by their comparative negligence. Our *Li* decision establishing comparative negligence rules can be seen as a first step in the judicial alteration of damages law, since our comparative fault rule commands a reduction in damages (based on plaintiff fault) in some cases. Our supermarket enterprise liability doctrine affords an opportunity to build on this case

law and begins the process of damages reform in a discrete doctrinal area.

The primary purpose of *Li* was to eliminate a barrier to victim compensation by abolishing the absolute defense of contributory negligence. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590, 146 Cal.Rptr. 182, 578 P.2d 899 [retaining joint and several liability and emphasizing “the practical ability of negligently injured persons to receive adequate compensation for their injuries.”].) See also *Daly v. Gen. Motors Corp.*, *supra*, 20 Cal.3d 725, 144 Cal.Rptr. 380, 575 P.2d 1162 [extending comparative negligence to strict products liability actions].)

Our adoption of a comparative negligence rule, in place of the contributory negligence rule, was an intermediate step parallel to our movement from a negligence rule to a defect-dependent regime of strict products liability. Today we take the next step by moving to a regime of supermarket enterprise liability—without a defect requirement and with no victim fault defenses—while directly limiting damages for intangible loss. This new doctrine removes needless barriers to the swift, efficient compensation of accident victims. The early precedent for our enterprise liability approach, including its elimination of fault-based defenses, is, of course, workers’ compensation legislation, and the desirability of eliminating fault-based defenses has long been recognized by enterprise liability scholars. (See, e.g., James & Dickinson, *Accident Proneness and Accident Law* (1950) 63 Harv. L.Rev. 769; O’Connell, *A Proposal to Abolish Contributory and Comparative Fault With Compensatory Savings by Also Abolishing the Collateral Source Rule* (1979) 1979 U. Ill. L.F. 591 (hereafter O’Connell, *A Proposal*).) As the ALI Reporters’ Study has reiterated, “little incentive to take care is lost when a patient (or worker [or supermarket customer]) is told that even though he might suffer a painful, perhaps even fatal injury, he or his surviving dependents will be able to recover compensation for the losses.” (2 ALI Reporters’ Study, *supra*, at p. 511.)

4. *The Specifics of Supermarket Enterprise (No-Fault) Liability*

a. *The Limitation to Supermarkets*

The rationale supporting supermarket enterprise liability could arguably support a broader enterprise liability, applicable to business premises generally. (See *Smith v. Arbaugh’s Restaurant, Inc.* (D.C. Cir.

1972) 469 F.2d 97, 107 (conc. opn. of Leventhal, J.) [singling out business premises for special treatment in the context of abandoning traditional limitations of landowner liability].) Alternatively, a business premises enterprise liability might be limited to those situations where the mode of operation rule has been adopted (a category broader than supermarkets). This category might be defined to include self-service retail stores where “the proprietor could reasonably anticipate that hazardous conditions would regularly arise.” (See *Chiara v. Fry’s Food Stores, Inc.* (Ariz. 1987) 733 P.2d 283, 285.)

The doctrine we adopt, however, applies to supermarkets, the setting of the cases on appeal. This category provides a clear boundary for our doctrine. This is desirable both to avoid extensive litigation over a less clear boundary, and because supermarkets have characteristics that may not be shared by other businesses that might be covered by a broader doctrine. Supermarkets create specific types of hazards and have established claims reporting and handling procedures that should provide useful data in our practical determination of specific damages rules (as we discuss below). The precedent for limiting a new strict (in this case enterprise) liability rule to a small subset of a broader category of cases is, of course, the foods products cases, where strict liability was applied prior to our development of the modern doctrine of strict products liability. (See, e.g., *Ryan v. Progressive Grocery Stores, Inc.* (N.Y. 1931) 175 N.E. 105, 106.)

b. Development of Damages Rules

While, as we have discussed, the need, policy bases, and judicial precedent for damages reforms are clear, we recognize that the specifics of those reforms are crucial. We also recognize that in deciding those specifics, we are breaking new ground. Finally, we recognize that a common theme among leading judges of recent decades is that judges too often make insufficient systematic inquiry into what Professor Kenneth Culp Davis called “legislative facts,” and, more importantly, have failed to employ procedures that could increase their access to such facts and provide various interested parties with an ability for input in this process. (See Posner, *The Problematics of Moral and Legal Theory* (1999) xiii; Friendly, *The Courts and Social Policy: Substance and Procedure* (1978) 33 U. Miami L.Rev. 21, 38–39; Traynor, *The Limits of Judicial Creativity* (1977) 63 Iowa L.Rev. 1, 11–12.)

In this case, therefore, we will appoint a special master to collect data, hear from interested parties, analyze damages alternatives, and propose a damages formula consistent with the views expressed in this opinion for adoption by this court. At this time, we will not spell out the details—substantive or procedural—of this inquiry, but we will mention some

relevant considerations. The first is the cost to the supermarkets and their insurers of the present approach to supermarket accidental injury and the cost that would be incurred if all negligently injured persons were, *in fact*, to receive the damages allowed under current law. Similar studies of medical accidents have been conducted and are reported in the ALI's *Reporters' Study*. (See 2 Reporters' Study, *supra*, at pp. 491–492.) Court files and, when available, claims, settlement, and accident data from supermarket records are among the sources of this information. In developing a damages approach under which the total cost to supermarkets and their insurers does not exceed a reasonable total based on the data collected, pecuniary loss should, of course, be given priority.

In determining the proper measurement of damages under this new enterprise liability, consideration should be given to the pioneering efforts by scholars, including Louis Jaffe, Fleming James, Roger Traynor, and Jeffrey O'Connell, all cited *supra*, as well as approaches suggested by the ALI *Reporters' Study*. (See 1 ALI Reporters' Study, *supra*, at pp. 218–229.) Also relevant are the issues of attorneys' fees and the effect of the level of damages on incentives for victims to bring claims. (See Bovbjerg & Sloan, *No-Fault for Medical Injury: Theory and Evidence* (1998) 67 U.Cin. L.Rev. 53 [discussing Virginia and Florida no-fault plans for neurologically impaired infants with birth-related injuries]). See also O'Connell, *A Proposal*, *supra*, at p. 333.) Finally, the development of damages rules should be informed by the recent enactment, and implementation by the Special Master, of the September 11 Victim Compensation Fund. (See Rabin, *The Quest for Fairness in Compensating Victims of September 11* (2001) 49 Clev. St. L.Rev. 573.)

